



Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

Clifford M. Harrington
tel 202.663.8525
clifford.harrington@pillsburylaw.com

December 11, 2012

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket No. 09-182

Dear Ms. Dortch:

On December 9, 2012, David Smith, President and Chief Executive Officer of Sinclair Broadcast Group, Inc. (“Sinclair”), met with Commissioner Clyburn.

During a wide-ranging conversation, Mr. Smith discussed with Commissioner Clyburn recent reports indicating that the FCC may modify its rules to make Joint Sales Agreements (“JSAs”) between television stations in the same market attributable interests under the Commission’s multiple ownership rules.

Mr. Smith pointed out to Commissioner Clyburn that the proposal to attribute JSAs was made in a proceeding that is more than eight years old, and that since the FCC issued its 2004 Notice of Proposed Rulemaking on the proposed attribution of television JSAs in local markets,¹ there have been numerous changes in the television marketplace. He suggested that the Commission should open its now stale proceeding for further comment in order to refresh the now stale record before the FCC. Mr. Smith also noted that the JSA attribution proceeding was not one of the

¹ See *In the Matter of Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004).

December 11, 2012
Page 2

matters on which comments were solicited in the pending Quadrennial rulemaking proceeding.²

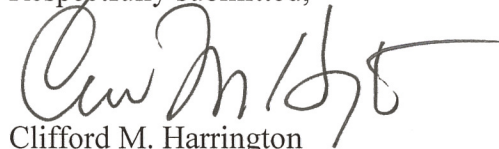
In support of his position, Mr. Smith supplied Commissioner Clyburn with a copy of a December 7, 2012, article by Harry Jessell in TVNewsCheck entitled *FCC Moving The Wrong Way On JSAs*. A copy of the article is attached.³

Mr. Smith told Commissioner Clyburn that a decision to attribute same market television JSAs would be based on a fundamental misunderstanding of how JSAs function in the marketplace today. He noted that, fundamentally, JSAs have nothing to do with the control of television programming. He also indicated that in Sinclair's experience as the licensee of both brokering and brokered stations pursuant to JSAs, brokered television stations maintain financial incentives to control programming and to compete.

Mr. Smith further discussed how the cost savings associated with combinations of two TV stations in a market are vital to the financial health of both stations, and that eliminating those savings could adversely affect their ability to provide high quality programming to the viewing public, particularly news programming.

Should you have any questions, please direct them to the undersigned.

Respectfully submitted,



Clifford M. Harrington

cc: Commissioner Clyburn
Dave Grimaldi

² See 2010 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, DA 12-1667 (rel. Nov. 14, 2012).

³ While the original article contained electronic links to other documents, Mr. Smith did not provide those articles to Commissioner Clyburn, and thus they are not provided with this notice.



Jessell at Large

FCC Moving The Wrong Way On JSAs

By Harry A. Jessell

TVNewsCheck, December 7, 2012 3:19 PM EST

I may have been wrong.

A year ago, I encouraged TV broadcasters who intended to set up virtual duopolies through via management contracts not to delay. In its review of its media ownership limits, I said, the FCC was considering closing that loophole in its duopoly rule, but not to worry. If it did, it would likely grandfather those already in existence.

Now, the word I'm getting out of the Washington is that the FCC may *not* grandfather those combos after all. Instead, I'm told, it is considering giving broadcasters just two years to unwind them. A vote is expected early in the new year.

This is bad news for the many broadcasters who have forged virtual duopolies as a means of maintaining margins while under incessant assault from cable and the proliferating digital media.

If the FCC follows through, broadcasters will have to figure out some way to restructure the duopoly deals to make them palatable to the FCC or simply abandon them. That's the last thing they need as head into a non-political, non-Olympic year in which their revenue could drop as much as 10%.

For a long time, the FCC duopoly rule prohibited a broadcaster from owning two stations in a market. But in 1999, as the Clinton administration began to wind down, the FCC relaxed the rule to permit ownership of two stations in a market as long as neither of the stations was top-four rated and the market had eight or more different owners.

In other words, you could own a CBS and CW affiliate in a large market, but not in small and many medium-size markets. And you couldn't own a CBS and ABC affiliate (or any combination of top-rated stations) in a market of any size.

To get around that rule, broadcasters and their clever lawyers cooked up the joint sales agreement (JSA) and shared services agreement (SSA) that, in essence, gives one station operational control over another without assuming ultimate control. That last phrase — ultimate control — is key. The FCC has routinely approved these deals when they came before it as long as the station owner, at least on paper, retains the ability to override any decision the managing broadcaster makes.

JSAs allow the managing station to sell all the time of the managed station. They are usually coupled with SSAs, under which the managing station typically provides facilities, back-office functions and news programming. To the dismay of cable and satellite operators, they often also represent the managed stations in retrans negotiations.

Together, the JSA and SSA amount to one station running the other.

It's a bona fide loophole that many broadcasters have happily exploited to the dismay of liberal groups opposed to media consolidation that, they believe, diminishes diversity of viewpoints and ownership.

You would think that if the FCC were so concerned about virtual duopolies, it would know how many there are and where they are. It doesn't. It relies on outside sources, as do I.

One of those sources is the American Cable Association, which opposes virtual duopolies on the ground that owners representing two network affiliates in the market have undue leverage in retrans negotiations.

To make its case, ACA started counting virtual duopolies involving combinations of Big Four network affiliates and found 65 in 58 markets. All but six are in markets 75 and above. (The ACA numbers are a little old. With the recent flurry of stations deals, I suspect that there are many more of them now.)

The ACA count does not include virtual duopolies in small markets involving Big Four affiliates matched with independents and secondary networks like the CW, Univision or MNT. I haven't found a good count on them yet.

According to my sources, the FCC is proposing to close the virtual duopoly loophole by making the JSAs "attributable" — that is, by making them count as actual ownership under the duopoly rule. And rather than grandfathering the existing JSAs, the FCC is apparently going to give stations two years to come into compliance.

I don't see how the FCC can justify doing so.

The foes of media consolidation are correct in saying the duopolies reduce the number of independent voices, but those voices are fading away anyway.

In markets 75-plus, stations ranked No. 3 or No. 4 in news are having a tough time of it, even though many have a major network affiliation. They would be not combining with their stronger rivals if they didn't feel they had to.

With some exceptions, the combinations created through JSAs and SSAs preserve newscasts or in some cases result in new ones — more hours of news every day, in English and Spanish. In an attempt to save the virtual duopolies, NAB lawyers visited FCC officials and left behind a long list of duopolies that yielded more, not less, news. It's impressive.

Part of the FCC's interest in curtailing JSA's and virtual duopolies is to preserve opportunities in broadcasting for new entrants, particularly minorities. The minority record is truly dismal. I can't name a single African-American station owner of a Big Four affiliate except DuJuan McCoy, and he just announced he was selling.

But I don't believe that in setting up duopolies broadcasters are standing in the way of minorities. Standalone small-market network affiliates are out there right now for anybody to buy at historically low multiples. They just aren't particularly good businesses anymore — for black, Hispanics, women or anybody else. By their absence, it's clear that minority entrepreneurs have better places to put their money.

By the way, if the FCC were truly concerned about diversity in broadcasting, it would shut down its incentive auction rulemaking, which aims to buy out marginal stations in big markets so they can be auctioned to wireless carriers. Those marginal stations are entry-level opportunities for anybody determined to get into broadcasting.

What's odd about the FCC's JSA proposal is that it is at odds with the deregulatory thrust of the larger rulemaking of which it is a part. That rulemaking also proposes to modestly loosen the newspaper-TV

crossownership rule and jettison the local newspaper-radio and TV-radio restrictions. It's not much, but for an agency with a Democratic majority, it ain't bad.

Rather than tightening its duopoly rule, the FCC ought to relax it to permit common ownership of any two stations in any market. But I realize that's asking for too much with liberal groups upset about the newspaper-broadcast provision and demanding some kind of blood and the FCC Democrats looking to placate them.

But the FCC could leave JSAs and the virtual duopolies as they are or could take the advice that Sinclair General Counsel Barry Faber gave when he visited the FCC this week: just punt. In a new and separate proceeding, the FCC could build its own database of duopolies and virtual duopolies and do a serious analysis of their impact on broadcasters and their viewers.

But if the FCC is determined to crack down on the virtual duopolies, it should at the very least grandfather the existing combos and avoid a major disruption in the industry and the likely devaluation of publicly traded, duopoly-heavy groups like Nexstar and Sinclair.

It should also grandfather them because I predicted it would.

And I hate to be wrong.

Harry A. Jessell is editor of TVNewsCheck. He can be contacted at 973-701-1067 or hajessell@newscheckmedia.com. You can read earlier columns [here](#).

Copyright 2012 NewsCheckMedia LLC. All rights reserved. This article can be found online at: <http://www.tvnewscheck.com/article/64074/fcc-moving-the-wrong-way-on-jsas>.